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Before the
Federal Communications Commission.
Washington DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of Application of)
SBC Communications, Inc. Pursuant)
to Section 271 of the) CC Docket No. 97-121
Telecommunications Act of 1996 to)
Provide In-Region, InterLATA Service)
in the State of Oklahoma)

Comments of Time Warner Communications Holdings, Inc.

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SUMMARY

Time Warner Communications Holdings, Inc.¹ ("TW Comm") respectfully submits these comments² in opposition to SBC Communication's ("SBC's") April 11, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Oklahoma (hereinafter "the Application"). TW Comm also supports the April 23, 1997 Motion to Dismiss the Application filed by the Association for Local Telecommunications Services ("ALTS") (hereinafter "ALTS April 23rd Motion"). TW Comm emphasizes that: (1) the Application is premature and (2) even if it were not premature, the defects in the Application identified in the April 23rd Motion justify the relief ALTS has proposed.

¹ A wholly-owned subsidiary of Time Warner Entertainment Company, L.P.

² The Common Carrier Bureau solicited comments and reply comments on SBC's Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma by Public Notice, DA 97-753, released April 11, 1997.

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In part, the Application is premature because Congress intended that Section 271 be implemented generically through rulemaking after implementation of the 1996 Act's interconnection provisions, Section 251 and 252. In addition, the Application is premature because the structure of Section 271 necessitates comprehensive implementation of an ongoing regulatory regime that provides for remedial action in the event of subsequent non-compliance by a Bell Operating Company. Further, the Application is premature because parts of Section 271 will necessarily require Commission interpretation before Section 271 may be implemented. Such necessary interpretations include, at a minimum, interpretation of: (1) what constitutes "predominantly" over a "competitor's facilities" and (2) the meaning and scope of the Commission's public interest responsibilities under Section 271.

Finally, the Application is premature because the broad language of the statute coupled with the legislative history demonstrates the necessity for generic implementation of Section 271 through rulemaking rather than case-by-case determinations. Consideration of Section 271 in such a comprehensive manner will better achieve the overall objectives of the Act. Implementation

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of Section 271 in a rulemaking proceeding will also substantially decrease the risk that the FCC's implementation of Section 271 will result in subsequent changes to its policies that a court could conclude were arbitrary and capricious.

In addition to being premature, the defects in the Application identified in the April 23rd Motion justify dismissal as ALTS has proposed. TW Comm associates itself fully with the arguments presented in the ALTS' April 23rd Motion and urges the Commission to grant the relief requested in the Motion. Specifically, The Application fails to satisfy the requirements of "Track A", 47 U.S.C. § 271(c)(1)(A) or "Track B", 47 U.S.C. § (c)(1)(B).

Under 47 U.S.C. § 271(c)(1)(A), SBC must comply with certain requirements referred to as Track A. Only if the requirements of Track A are not met because competitive local exchange providers have not requested interconnection may SBC seek to comply with the requirements set forth in 47 U.S.C. § 271(c)(1)(B), referred to as Track B. Thus, SBC does not have the choice of pursuing either Track A or B at its option and certainly may not pursue both options simultaneously. In this instance, because there is no dispute that competitive providers

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have sought interconnection with SBC in Oklahoma and there is no demonstration that those competitors have failed to negotiate in good faith or violated an implementation schedule for the interconnection agreements, the Track B approach is unavailable to SBC in that state.

The Application also fails under Track A. It is apparent that neither SBC nor ALTS claim that SBC has lost substantial market share in the provision of local services in Oklahoma. Nor is there any claim that the vast majority of Oklahoma consumers, either residential or business, have a realistic choice in the facilities used to provide them with local telephone service. The Application's apparent claim that the mere possibility of developing real competition fulfills the Competitive Checklist of Section 271 is devoid of any shred of plausibility in light of the clearly expressed pro-competitive policies underlying the 1996 Act.

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INTRODUCTION

Time Warner Communications Holdings, Inc.¹ ("TW Comm") respectfully submits these comments² in opposition to SBC Communication's ("SBC's")³ April 11, 1997 application under 47 U.S.C. § 271 seeking Federal Communications Commission ("FCC" or "Commission") authorization to provide in-region interLATA service in the State of Oklahoma (hereinafter "the Application"). TW Comm also supports the April 23, 1997 Motion to Dismiss the Application filed by the Association for Local Telecommunications

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² The Common Carrier Bureau solicited comments and reply comments on SBC's Application for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Oklahoma by Public Notice, DA 97-753, released April 11, 1997.

³ SBC and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Long Distance ("SBLD") collectively sought authority for SBLD to provide in-region, interLATA services in Oklahoma.

Services ("ALTS") (hereinafter "ALTS April 23rd Motion").

INTEREST AND PERSPECTIVE OF TW COMM

TW Comm is an emerging facilities-based provider of local telecommunications services. As such, it is a competitor of Southwestern Bell Telephone Company ("SWBT") in the provision of local services as well as a customer of SWBT's incumbent carrier operations to the extent that TW Comm must purchase services from SWBT in order to interconnect with SWBT's network. Although TW Comm does not operate in Oklahoma, it does operate in Texas, another state in which SBC is the incumbent local exchange carrier ("ILEC"), and the Commission's decision in this matter will have a significant effect on those operations. It is also TW Comm's view that the first case regarding Section 271 that the Commission decides on the merits will inevitably set precedent for other applications by incumbent Bell Operating companies ("BOCs") for states in which TW Comm is currently operational.

Without its own experience as a competitor in Oklahoma, TW Comm cannot address those aspects of either the Application or the April 23rd Motion that relate to the specifics of competition within that jurisdiction. However, TW Comm has experienced significant difficulties while implementing its interconnection

with SWBT in the Austin, Texas area, that have a direct and immediate effect on TW Comm's ability to enter that market successfully. In Texas, it appears to be absolutely necessary that SWBT have a business incentive to cooperate with competitors such as TW Comm.

It is apparent that neither SBC nor ALTS claims that SBC has lost substantial market share in the provision of local services in Oklahoma. Nor is there any claim that the vast majority of Oklahoma consumers, either residential or business, have a realistic choice in the facilities used to provide them with local telephone service. Based on the apparent state of competition in Oklahoma, SBC's claims for Section 271 relief essentially boil down to assertions that (1) it has "opened the door" to competition through interconnection arrangements that it has entered into and (2) the statutory tests for Section 271 relief do not require anything more. These assertions are grossly flawed because, as demonstrated below and in the ALTS April 23rd Motion, they misrepresent the statute and the nature of marketplace change it requires before incumbent BOCs may be permitted into interLATA markets.

It is not an overstatement to characterize Section 271 and its companion, Section 272, as constituting the heart of the Telecommunications Act of 1996. One of the fundamental competitive "bargains" of the Act is the requirement that the BOCs open their local markets to competition prior to the right to provide interLATA toll service in those same markets. As noted by the Commission itself:

The 1996 Act opens local markets to competing providers by imposing new interconnection and unbundling obligations on existing providers of local exchange service, including the BOCs. The 1996 Act also allows the BOCs to provide interLATA services in the states where they currently provide local exchange and exchange access services once [after] they satisfy the requirements of section 271. . . . [T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market.⁴

This presents a "win-win" situation for consumers because they receive the benefits of increased competition in both toll and local markets: more efficient, more attentive service, greater

⁴ In re the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 7 (Dec. 24, 1996) (emphasis and interpretation added) (hereinafter "First Report and Order").

innovation and, of course, lower prices.⁵

The statutory linkage between opened, competitive local service markets and entry by a BOC such as SBC into interLATA markets makes it incumbent upon the Commission to tread very warily as it starts down the Section 271 road. Entry into the interLATA market is the single most significant inducement for the BOCs to meet the Competitive Checklist requirements of section 271(c)(2)(B). It is the carrot. Once the carrot is eaten, however, the inducement is gone. Once a BOC is permitted to provide in-region interLATA service, its incentive to make local service interconnection workable in that region is removed. One need look no further than the rearguard actions of the non-BOC ILECs in opposition to open interconnection arrangements to find validation of this incentive principle.⁶ The most

⁵ The Commission further noted within that same Order:

With the removal of legal, economic, and regulatory impediments to entry, providers of various telecommunications services will be able to enter each other's markets and provide various services in competition with one another.

Id.

⁶ It is no coincidence that the legal challenges to the Commission's August 8, 1996 Interconnection Order, In re

obstreperous behavior and the greatest resistance to implementation of competitive market entry is displayed by ILECs who do not have such incentives.

Thus, the Application squarely places before the Commission the formidable challenge of implementing Section 271 for the first time. It does so, however, at a time when the Commission, in fulfillment of its other heavy responsibilities under the 1996 Act, has not yet had the opportunity to consider comprehensively the necessarily complex issues inherent in the statute's implementation. While there are undoubtedly benefits to consumers to be gained from making the interLATA interexchange market in Oklahoma more competitive through SBC's entry, the possible detriments to local competition from Commission action that is not well-considered far outweigh those benefits, particularly in light of the fact that any action herein will be a precedent for future applications by other BOCs. Thus, TW Comm urges that any action on the Application be premised on a long-

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (Aug. 8, 1996), now before the Eighth Circuit in Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases, were brought by GTE, a non-BOC ILEC. GTE and other non-BOC ILECs that are not subject to Section 271 have been among the most litigious opponents to implementation of the 1996 Act.

term view of the Act and its underlying policies.

Indeed, assuming only for the sake of argument that the Application provides an accurate portrayal of the service that SBC provides to competitive local exchange carriers ("CLECs") in Oklahoma, SWBT's behavior in Oklahoma is inconsistent with its behavior in Texas. As a customer, and an emerging competitor of SWBT in Texas, TW Comm has first hand knowledge that, for example, SWBT has not provided non-discriminatory access to directory assistance, reasonable inclusion of competitors in SWBT's white pages listings,⁷ or nondiscriminatory central office collocation as compliance with the competitive checklist of Section 271 would require. This points up the inherent danger in relying on the narrow factual base relating to a jurisdiction such as Oklahoma - clearly not representative of the nation as a whole - as the basis for establishing precedent or policy in the implementation of Section 271. The factual circumstances involving a particular Section 271 application, by definition, can relate only to a particular state, and cannot be assumed to be representative of the region in which that particular BOC

⁷ Indeed, SWBT has used its white page directories to publish its anti-competitive views, prefacing its 1995 Directory with an admonition against competitive telephone service entitled, "Beware of imitation brands."

provides service or the nation generally. Given the statutory interpretation and policy issues which must accompany any application of Section 271, it is apparent that this statute is particularly ill-suited to case-by-case implementation, and that this particular application of SWBT in Oklahoma is a poor vehicle as the first Section 271 case.

ARGUMENT

The Application should be dismissed because (1) the issues it raises cannot be reasonably addressed by the Commission at this time and at this juncture of the implementation of the Telecommunications Act of 1996 (i.e. the Application is premature); and (2) even if the Application were not premature, it is defective in its failure to address certain critical issues. These points are each addressed below.

I. THE SBC APPLICATION IS PREMATURE

The Application is premised on the assumption that Section 271 is self-actuating and does not require prior interpretive or other action by the Commission before it can be implemented. In other words, SBC has assumed that it is possible to divine the statutory section's requirements from its text and to submit information that would fulfill those requirements at

this stage of the implementation of the Telecommunications Act of 1996, without any further action on the part of the Commission or the courts.

However, this assumption is simply incorrect. Like virtually all other provisions of the 1996 Act, implementation of Section 271 cannot occur in isolation but requires the context of the implementation of other provisions, particularly Sections 251 and 252 dealing with issues of interconnection requirements as well as negotiation, arbitration and approval of interconnection agreements. Given that the statute also is not clear on its face and in any event contemplates an ongoing regulatory regime, it is apparent that reasonable implementation of Section 271 will first require the Commission to address a number of policy issues, most probably in the context of a rulemaking. SBC's creative and erroneous interpretation of Section 271(c)(1)(B) provides further support for the need for such a proceeding.

- A. Congress intended that Section 271 be implemented generically through rulemaking - not on a case-by-case basis - subsequent to implementation of Sections 251 and 252.
-

1. Implementation of Sections 251 and 252 are necessary pre-conditions to implementation of Section 271.
-

As noted supra at page 5, implementation of Section 271 is linked to the implementation of Sections 251 and 252. This linkage exists in order to provide an incentive for the BOCs to open their local service markets to competition. As the Commission emphasized in its recent order on Non-Accounting Safeguards,⁸ the statute's requirement that BOC's comply with Section 271(c)(2)(B)'s Competitive Checklist before it may provide in-region interLATA service is central to achieving the competitive goals of the 1996 Act:

[T]he statute links the effective opening of competition in the local market with the timing of BOC entry into the long distance market, so as to ensure that neither the BOCs nor the existing

⁸ In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, para. 8 (Dec. 24, 1996) (hereinafter "First Report and Order").

interexchange carriers could enjoy an advantage from being the first to enter the other's market.⁹

In fact, the Competitive Checklist of Section 271(c) (2) (B) explicitly requires a BOC's implementation of specific provisions of Sections 251 and 252 as a condition precedent to obtaining interLATA entry.¹⁰ Thus, it is apparent that until the Commission took steps to implement Section 251 and 252 on August 8, 1996¹¹, it would not have been possible for the Commission under the terms of the statute to grant any BOC application under Section 271.

However, despite the issuance of the Interconnection Order, the Application is premature because the August 8, 1996 Interconnection Order has been challenged on appeal and portions of it have been stayed. The pendency of the Eighth Circuit appeal and its accompanying stay¹² precludes the development of permanent interconnection rates that are one of the prescribed

⁹ Id.

¹⁰ 47 U.S.C. Section 271 (c) (2) (B) (i) - (xiv).

¹¹ In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order (Aug. 8, 1996).

¹² Iowa Util. Bd. v. FCC, No. 96-332 and consolidated cases (8th Cir. Oct. 15, 1996).

circumstances referred to above. Without permanent interconnection rates, a BOC cannot meet Track A's condition that local competition must exist.

Pursuant to Section 271's Competitive Checklist, interconnection must be provided "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."¹³ Section 251(c)(2) requires that interconnection be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory"¹⁴

The justness, reasonableness, and/or discriminatory nature of these rates for Section 271 purposes cannot be determined with any degree of finality until the judicial review process of the 8th Circuit has been completed. In that proceeding, the court has stayed the FCC's mandate that a state commission rely on the total element long-run incremental cost ("TELRIC") to determine the rates for competitive providers' use of ILECs' facilities as well as the Commission's requirement that a state commission rely on the FCC's proxy rates if it chooses not to rely on the TELRIC methodology to set rates.

¹³ 47 U.S.C. § 271(c)(2)(B)(i).

¹⁴ 47 U.S.C. § 251(c)(2)(D).

This is not to suggest, however, that the effect of the Eighth Circuit's stay has been to halt all implementation of the 1996 Act. Certainly, the negotiations and arbitrations contemplated by Sections 251 and 252 of the Act are going forward, as the Eighth Circuit itself recognized to be appropriate. The agreements either voluntarily entered into or forged through the arbitration process can and should be made effective.¹⁵ However, since those same agreements would have to be relied upon by the Commission as a basis for action under Section 271, the uncertain effect that the judicial review process will have on those agreements necessarily calls into question whether the Commission can reasonably grant any Section 271 applications until the underlying issues have been settled.

The uncertainty regarding the ultimate structure of interconnection arrangements, particularly the unbundled element pricing rules, makes the process of implementing Section 271 much more complex because measuring whether the public interest in competitive markets has been adequately provided for through

¹⁵ Among other things, some mechanism will have to be found to enforce the "most favored nations" clauses in negotiated interconnection agreements and related contracts. It is not clear whether the most efficient means of enforcement would be through a state law contract dispute process or a FCC complaint mechanism.

interconnection arrangements - the essence of Section 271 implementation - becomes far more intricate than Congress could have contemplated when the statute was passed. The uncertainty related to the Eighth Circuit's decision regarding the Interconnection Order, and any subsequent review, effectively preclude the Commission from being able to reach determinations regarding satisfaction of the Competitive Checklist set forth in Section 271(c)(2)(B).

- B. The structure of Section 271 necessitates comprehensive implementation of an ongoing regulatory regime that provides for remedial action in the event of subsequent non-compliance by a BOC.**
-

Section 271 was designed to provide for continuing Commission oversight over BOC compliance with Sections 251 and 252. The enforcement provisions of Section 271(d)(6) contemplate the possibility that a BOC might "cease[] to meet any of the conditions required for such [Section 271] approval"¹⁶ and provide for specific remedial action by the Commission in that event. Given that, an Application that demonstrates the mere existence of conforming interconnection agreements without the requisite competitive showing and argues that such agreements are

¹⁶ 47 U.S.C. Section 271(d)(6)(A).

sufficient to meet the requirements of Section 271 is without merit.¹⁷ Continuing Commission oversight of BOC compliance would not be needed if the Commission's function were limited to verifying the existence of agreements. Rather, the more reasonable interpretation - indeed, the only reasonable interpretation - of the Competitive Checklist requirements is that they can only be fulfilled by demonstrating the fact of competitive elements, not their mere theoretical possibility in the form of contracts that may or may not be adhered to.

However, the existence of Section 271(d)(6) is also important because it demonstrates that implementation of the section has to go beyond determining whether any applicant has met the Competitive Checklist. Because the language of the statute does contemplate an entire, ongoing regulatory regime, before the Commission can reasonably grant any one application, it has to consider the whole range of its responsibilities in the

¹⁷ SBC refers to the "interconnection and resale agreements" it has with Brooks Fiber Communications ("Brooks"), Dobson Wireless, Inc., ICG Telecom Group, Inc., Sprint Communications, US Long Distance Inc., and Western Oklahoma Long Distance but discusses only its interconnection arrangements with Brooks at length. Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121 at 4-5 (April 11, 1997) (hereinafter SBC Brief).

matter, including the possibility of non-compliance and the protection of the public interest in that event. The Commission has clearly indicated that rules under which complaints of non-compliance pursuant to Section 271(d)(6)(B) will be fashioned at a later time.¹⁸ That being the case, the Application cannot be presently considered consistent with the dictates of reasoned decision making.

**C. Parts of Section 271 will necessarily require
 interpretation before the statute can be implemented.**

Because Section 271 is not clear on its face, if the Commission chooses to implement Section 271 in this proceeding, it will be forced to interpret certain portions of Section 271 on an expedited basis during the 90 day statutory period within which it must consider a BOC's Section 271 application. At a minimum, implementation of Section 271 will require interpretation of the following statutory provisions: (1) the meaning of the phrase, "predominantly over their own telephone exchange facilities" as set forth in Section 271(c)(1)(A); and (2) how the Commission will administer its public interest responsibilities under the Section.

¹⁸ First Report and Order at para. 337.

1. The Commission necessarily will have to interpret what constitutes "predominantly" over a competitor's facilities.

SBC's interprets the term "predominantly over their own telephone exchange facilities . . ." in the Application and asserts that competitors currently provide service "predominantly over their own telephone exchange facilities" in Oklahoma. Subsequent challenges to SBC's statements that it is actually providing facilities-based service as envisioned by Section 271 highlight the difficulty associated with this term.¹⁹ Even if the Commission reached a determination that Brooks Fiber Properties, Inc. ("Brooks") is actually providing service over its own exchange facilities in Oklahoma, because such a determination would be so case-specific, it is unlikely that it would provide sufficient guidance for future Section 271 applications. Accordingly, it is likely that each future Section 271 proceeding would include a significant dispute regarding the definition of the term "predominantly over their own telephone exchange facilities" The Commission should establish

¹⁹ Such challenges are included in ALTS' April 23rd Motion as well as Brooks' comments filed with the Commission on April 28, 1997 in response to the Commission's request for comment on the April 23rd Motion confirm that difficulty. The Common Carrier Bureau solicited comments the ALTS April 23rd Motion by Public Notice, released April 23, 1997.

generic guidelines on the extent to which a carrier must rely on its own facilities to provide service in order to satisfy this test.

The legislative history indicates that Congress intended to define a competitor offering competing service "predominantly" over its own facilities as much more than a mere reseller of services. Indeed, Congress plainly contemplated that a competing provider would not rely on its own facilities exclusively. The Act's Conference Report explains:

With respect to the facilities-based competitor requirement, the presence of a competitor offering the following services specifically does not suffice to meet the requirement: (1) exchange access; (2) telephone exchange service offered exclusively through the resale of the BOC's telephone exchange service; and (3) cellular service. The competitor must offer telephone exchange service either exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service.²⁰

²⁰ 142 Cong. Rec. H1078, H1117 (daily ed. Jan. 31, 1996) (emphasis added). As the conference agreement reflects, the intent was that a competing provider would probably obtain some services and capabilities from the BOC itself:

This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (e.g., central office switching) will